

**REPORT TO THE
COMMITTEES ON APPROPRIATIONS
PURSUANT TO
FY 1999 ENERGY AND WATER APPROPRIATIONS
ACT
CONFERENCE REPORT (H. REPT. 105-749)**

I. EXECUTIVE SUMMARY

This Report responds to the following observations and direction contained in the Conference Report for the Energy and Water Appropriations Act for Fiscal Year 1999:

"The Department of Energy's laboratories are prohibited from competing with the private sector by numerous statutes and regulations including the Atomic Energy Act of 1954 and provisions in the Federal Acquisition Regulation regarding Federally Funded Research and Development Centers.

The conferees have received complaints that the Department of Energy has failed to enforce these provisions at the laboratories and other facilities, and that adequate recourse is not available to those that allege harm.

The conferees direct the Secretary of Energy to assess the statutory and regulatory limitations on laboratories and other Departmental entities allegedly competing with the private sector, and to ascertain what grievance mechanisms are available to the private sector. The Secretary is directed to provide this information to the Committees by March 1, 1999, and to make such information readily available to the private sector."^{*}

This Report assesses the statutes and regulations which address competition with the private sector by the Department's laboratories and the Power Marketing Administrations (PMAs), identifies oversight mechanisms employed by the Department to monitor laboratory activities, and discusses the grievance and dispute resolution mechanisms available to third parties who allege harm.

This Report describes the prohibitions and limitations on the laboratories' and the PMAs' directly competing with the private sector. However, the Report also identifies statutes, regulations, and related policies granting authorities to the laboratories and PMAs. As to the laboratories, these authorities relate to technology transfer, title to inventions, and licensing that encourage commercial collaborations and formal interaction with private entities. Similarly, the Report identifies the authorities underlying the activities of the PMAs relating to the provision of hydroelectric power. Conflicts between prohibitions on competing with the private sector and promoting collaborations in the case of the laboratories and providing power in the case of the PMAs create inherent tensions on the activities of these entities. Predictably, the tension among coexisting statutes, regulations and policies makes it difficult for the laboratories and the PMAs to exercise these authorities without evoking occasional complaints. However, a variety of grievance and dispute resolution mechanisms is available to enable firms to address their concerns and complaints.

^{*} H.R. Conf. Rep. No. 105-749, at 90 (1998) ("Conference Report").

II. INTRODUCTION

The Department of Energy ("DOE" or "Department") maintains a complex of laboratories and other entities* to help execute its statutory missions.* The majority of the DOE laboratories are presently managed either by a university or a consortia of universities. These include both multi-program laboratories (*e.g.*, Argonne, Lawrence Berkeley, Lawrence Livermore, Los Alamos and Brookhaven), as well as program-dedicated laboratories (*e.g.*, Ames, Princeton, Thomas Jefferson, Fermi, and Stanford). A number of other laboratories are presently managed by not-for-profit and profit-making industry organizations (*e.g.*, Pacific Northwest National Laboratory operated by Battelle Memorial Institute, and Oak Ridge National Laboratory, Sandia National Laboratories and Idaho National Engineering and Environmental Laboratory, which are currently operated by Lockheed Martin affiliates). The Department also operates four federal Power Marketing Administrations which primarily market hydroelectric power generated at federal dams: Southeastern Power Administration, Southwestern Power Administration, Western Area Power Administration and Bonneville Power Administration.

In responding to the Conference Report, the Department interpreted the terms "competing with the private sector" to include not only direct, head-to-head competition that might occur if a laboratory were to respond to a solicitation issued by another federal agency or provide services that were readily available from the private sector, but also the less direct type of "competition" that might be considered to occur when, for example, a laboratory patents an invention created in the course of its DOE work and proceeds to transfer the new technology to the private sector through the various commercial mechanisms available to it. Indirect competition also may be viewed to occur when a laboratory collaborates with a firm's market rival, and, through the collaboration, affords a competitive advantage to the rival.

In examining the authorities that limit the laboratories and PMAs from competing with the private sector, the Department thought it useful to identify the major vehicles through which these entities might be viewed as "competing" with the private sector. As a result, Section III of the Report individually addresses the statutory and regulatory authorizations and limitations associated with four vehicles which comprise the vast majority of actual or potential laboratory activities that could be viewed as falling into the rubric of "competition": Work For Others, Cooperative Research and Development Agreements (CRADAs), Licenses, and Subcontracts. Section III also examines the oversight processes established by DOE to monitor the activities of the laboratories. Section IV assesses the grievance and dispute resolution mechanisms available to third parties who wish to complain about the activities of a laboratory. In light of the unique authorities granted to the PMAs, Section V separately addresses the statutory and regulatory

* Appendix A contains a listing of the Department's laboratories (i.e. DOE facilities having technology transfer authority) and Power Marketing Administrations (PMAs). Committee staff advised that the "other Departmental entities" addressed by the Conference Report were intended to refer to the Department's PMAs.

* The Department's September 1997 Strategic Plan describes these missions as four "Business Lines": National Security, Energy Resources, Environmental Quality, and Science and Technology.

limitations relating to the PMAs, as well as available grievance and dispute resolution mechanisms. The grievance and dispute resolution mechanisms relating to the laboratories and the PMAs run a continuum, from telephone inquiries to informal complaint processing, from Congressional inquiries to contract litigation, with the vast majority of issues being handled by informal means. As a matter of policy*, DOE encourages the use of Alternative Dispute Resolution techniques (where appropriate) at any point in the grievance and dispute resolution process.

III. ASSESSMENT OF LABORATORY STATUTORY AND REGULATORY AUTHORITIES AND RESTRICTIONS

This section focuses on the statutory and regulatory authorities and restrictions relating to the activities of DOE's Government-owned Contractor-operated (GOCO) laboratories. The discussion also addresses the Department's Government-owned Government-operated (GOGO) laboratories, and highlights where the authorities and limitations of the GOCOs and GOGOs differ. Appendix B is a graphical matrix summarizing relevant statutory and regulatory authorities and restrictions, DOE implementing guidance and available grievance and dispute resolution mechanisms for the particular laboratory transactions that are highlighted in the following sections of this Report.

A. LABORATORY AUTHORIZED TRANSACTIONS

Work for Others

Work for Others (WFO) is the performance of work for non-DOE entities by contractor personnel using DOE facilities but not direct DOE funding.* Relevant statutory and regulatory coverage provides express authority to engage in Work for Others so long as the activities to be performed by the laboratory are not otherwise available from the private sector.* This coverage clearly establishes that in performing services for non-DOE entities, DOE laboratories must not compete with the private sector.*

* See DOE General Counsel Home Page, Office of Dispute Resolution website at www.gc.doe.gov/adr/index.html for DOE's published policy, dated September 18, 1995.

* See DOE Order 481.1.

* See Economy Act of 1932, as amended, 31 U.S.C. 1535; *see also* sections 31-33 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2051-2053.

* WFO is a transaction utilized almost exclusively by GOCOs. At several DOE GOGOs statutory authority has been provided to do "contributed funds agreements," which are similar to a WFO. As a matter of practice these transactions, like a WFO, are restricted to those that do not compete with the private sector.

DOE Order 481.1 provides detailed controls applicable to the WFO program. Among other things, before any Work for Others activity is undertaken by a DOE facility, a written certification must be made by the approving DOE Contracting Officer or a DOE official to whom such authority has been delegated that the proposed work is not in competition with the private sector. The current DOE policy allows the Heads of Field Elements to delegate to management and operating (M&O) contractors the authority to make determinations and execute DOE Standard Non-Federal Work for Others Agreements (also called "bilateral sales contracts"). This delegation permits the M&O contractor to act within specific, well-defined guidelines that have been developed by the Department. The delegations may not authorize the contractor to exercise general discretionary authority or make individual value judgments on behalf of the Department. In negotiating any changes to the agreement, the M&O contractor represents itself, and not the DOE.

The delegated authority may be used only when DOE pre-approved terms and conditions are used, and there is written DOE approval of a Contractor Management and Administration Plan, which describes the M&O contractor's management and administrative procedures to execute and administer the WFO agreements. Any non-standard articles must be sent to DOE for approval. The Plan must detail the system agreed to by DOE and the contractor for making the determinations required by DOE policy, and must also provide for periodic review of contractor policies and procedures and implementation of those procedures.

The actual practice of providing certifications that WFO arrangements are not competing with the private sector by DOE approving officials involves the receipt and review of representations by the laboratories that the work they propose to perform for an outside sponsor does not compete with the private sector. Some Operations Offices use a WFO questionnaire completed by the laboratories. The questionnaire provides an explanation as to why the work cannot be done by the private sector. In addition, pursuant to Federal Acquisition Regulation (FAR) 17.503 and 17.504, a federal sponsor is required to make a determination and finding (D&F) that the requested work will not place a Federally Funded Research and Development Center in direct competition with the private sector. In accordance with DOE Order 481.1, the federal sponsor is required to provide a written statement to that effect. Thus, for federal work, the ordering agency has significant responsibility along with DOE to determine that the work is not in competition with the private sector.

When laboratories work directly for the private sector, there is no similar certification requirement to be made by the private sector sponsor. Approving DOE officials rely on the information provided by the laboratory and their own knowledge of the relevant technologies or industries. A certain self-policing occurs with private industry sponsors because they are familiar with their own industry, and market forces will naturally force them towards the most competitive research or technology for the development of their product or service. That is, if a company knows of better alternatives in the marketplace, private sponsors would likely be attracted to those sources. DOE laboratories maintain a policy of equal access to all potential sponsors so no individual sponsor has an advantage by virtue of special access to the laboratory.

Further, current DOE policy prohibits facility management contractors and Federally Funded Research and Development Centers (FFRDCs) from responding to other Federal agency Requests For Proposals (RFPs) or any other solicitation that provides for head-to-head competition either as an offeror, team member or subcontractor to an offeror where solicitation responses are compared directly against one another and for specific deliverables or hardware systems as defined in the Federal Acquisition Regulation (FAR). DOE believes that allowing such involvement would be contrary to the FAR prohibition against FFRDCs' competing with the private firms under government solicitations.

The DOE Work for Others program also governs DOE laboratories' responding to Broad Agency Announcements (BAAs) for research issued by other Federal agencies (OFA). As set out in FAR 35.016, BAAs are used by agencies to fulfill their requirements for scientific study and experimentation toward advancing the state-of-the-art or increasing knowledge or understanding rather than focusing on a specific system or hardware. BAAs are used when meaningful proposals with varying approaches can be anticipated and multiple awards are made within the constraints of available funding. The organizations that submit proposals are not directly competing against each other but rather are attempting to demonstrate that their proposed research meets the sponsoring federal agency's requirements. Accordingly, laboratories are permitted to respond to such announcements should a laboratory obtain funding as a result of submitting a response to a BAA, the work is performed under its Work for Others program, and the sponsoring federal agency would be required to provide a statement that the proposed scope of work would not place the FFRDC in competition with the private sector.

Cooperative Research and Development Agreements

A Cooperative Research and Development Agreement (CRADA) is an agreement between one or more Federal laboratories and one or more non-federal parties under which the laboratory provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research and development efforts.* By statute, a laboratory's CRADA efforts must be consistent with the mission of the laboratory.* CRADAs, like licensing, are intended to "encourage and facilitate collaboration among Federal Laboratories, State and local governments, universities, and the private sector ... in order to assist the transfer of technology to the marketplace".* Relevant

* Section 3710a(d)(1) of Title 15, United States Code, states that the term CRADA "does not include a procurement contract or cooperative agreement." For this reason and the fact that work under CRADAs are not "federal acquisitions" subject to federal procurement laws and regulations, the prohibitions on FFRDCs competing with the private sector contained in the FAR do not apply in the context of CRADAs.

* See Stevenson-Wydler Act, 15 U.S.C. 3710a(d)(1).

* See Executive Order 12591.

statutory and regulatory coverage makes technology transfer a mission of DOE laboratories* and provides express authority to engage in CRADAs. These authorities contain no express proscription against performing CRADAs that compete with the private sector in contrast with Work for Others.

As with the licensing of technology, discussed below, it is inherent in the transferring of new technologies from the Federal laboratory to the private sector that new technologies introduced into the private sector may interfere with and possibly displace existing or emerging technologies already in and provided by the private sector. It is possible, therefore, that a private sector entity whose technology might be displaced in the marketplace by a new technology derived from a CRADA between a laboratory and another firm could view the CRADA as "competing with the private sector." This result, however, occurs as the consequence of the statutory mandate to all federal agencies to provide the private sector the opportunity to partner with the laboratories through CRADAs and the success of any technology emerging from such partnerships due to market forces.

The successful transfer into the marketplace of any advanced technology which may arise from collaborations between DOE laboratories and commercially competitive private sector entities is fundamentally a part of the Department's mission. The transfer of such technology creates public benefits, but also may perturb the market status quo. It should not be unexpected that successful technology transfer programs can, and will likely, lead to complaints from some entities adversely affected by the displaced economic activities. Similarly, in cases where technology transfer programs have been implemented inappropriately, complaints may also arise. As discussed in Section IV, these complaints can be raised through various available grievance and dispute resolution mechanisms.

The authority to enter into CRADAs is implemented at authorized DOE GOCO laboratories by the inclusion in the management and operating contract of the laboratory of the clause found at Department of Energy Acquisition Regulations (DEAR) Part 970.5204-40. The clause includes provisions promoting fairness of opportunity in the availability of technologies for transfer to the private sector, provisions governing the selection of CRADA partners, provisions assuring the commercial advantages arising from the CRADA provide economic benefit to the U.S. economy, and provisions establishing the mechanism by which DOE approves each and every CRADA. Guidance governing the terms and conditions of CRADAs and for the approval by DOE of CRADAs is contained in the "Modular CRADA."* Other internal guidance documents establish programmatic criteria for selection of appropriate CRADA projects. Pursuant to Executive Order

* Section 3133(d) of Pub. L. No. 101-189 required DOE to provide appropriate contract language to "establish technology transfer, including cooperative research and development agreements, as a mission for the [DOE] laboratory."

* See DOE General Counsel Home Page, Technology Transfer website at www.gc.doe.gov/techtrans/index.html.

12591, as amended, DOE has delegated to the directors of its GOGO laboratories the authority to enter into CRADAs. GOGO laboratories follow the same policy and statutory prescriptions for the CRADAs they enter into as required of the DOE GOCOs by contract.

Licensing

A license is a conditional right granted by the technology owner to permit another to exercise all or some portion of the ownership rights of the technology owner. Licensing of technology arising at a federal laboratory to the private sector is, like a CRADA, specifically authorized and intended to assist the transfer of technology to the marketplace."* Licensing is in furtherance of the Congressional objective "to use the patent system to promote the utilization of inventions arising from federally supported research or development...."* Like CRADAs, relevant statutory and regulatory coverage provides express authority to engage in licensing.

The authority to enter into a license is implemented at appropriate DOE GOCO laboratories by the inclusion in the management and operating (M&O) contract of the laboratory of the Technology Transfer clause found at DEAR Part 970.5204-40. Ownership of patents and copyrights available for licensing by the M&O contractor are established by the Patent Rights and Rights in Data clauses contained in the contract. The data clause is found at DEAR 970.5204-83. The Patent Rights clause for a nonprofit contractor is found at DEAR 970.5204-71. The Patent Rights clause for a for-profit contractor is specified in an Advanced Patent Waiver granted in accordance with 10 C.F.R. 784 which is issued for each M&O contract in which technology transfer has been made a mission of the laboratory. The Technology Transfer clause includes provisions promoting fairness of opportunity in the availability of technologies for transfer through licensing to the private sector, provisions governing the selection of licensees, and provisions assuring the benefits arising from the license provide economic benefit to the U.S. economy. Consistent with the policy of the Bayh-Dole Act, 35 U.S.C. 200 *et seq.*, whereby a government contractor is given ownership of a new invention made under the government contract and discretion to license that invention without advanced approval by the government, licenses issued by DOE M&O contractors are not approved in advance by DOE, and licensees are selected at the discretion of the laboratory contractor within the strictures of the contract.

Pursuant to Executive Order 12591, as amended, DOE has delegated to the director of its GOGO laboratories the authority to enter into patent licenses. Licensing of patents by GOGO laboratories is done in accordance with the government-wide licensing regulations found at 37 C.F.R. 404 as supplemented by DOE at 10 C.F.R. 781.

The establishment of the property right to be licensed is undertaken by the laboratory contractor

* See Exec. Order No. 12591, 52 Fed. Reg. 13414 (1987), *as amended*, Exec. Order No. 12618, 52 Fed. Reg. 48661 (1987).

* See Bayh-Dole Act, 35 U.S.C. 200 *et seq.*

at a GOCO and a government employee at a GOGO through the patent or copyright laws of the United States and foreign countries. Their capacity as government contractors or government employees does not entitle the laboratory contractors to any preferred right or privilege not afforded private parties seeking to establish a property right through patent or copyright. Thus, in applying for a patent, a laboratory contractor or government employees must follow the same steps and is afforded the same administrative appeal rights as any private party.

As with CRADAs, the licensing of technology may result in new technologies being introduced into the marketplace that may compete with and possibly displace existing or other emerging technologies. The selected licensee, a private sector party operating in the private sector, must inevitably compete with other private sector parties selling competing existing or newly developed technologies of their own. By operation of the marketplace, the most cost effective, efficient and promising technologies should emerge as the winners.

Subcontracting

Subcontracting* is the obtaining of goods and services by the GOCO laboratory through a contract with a private sector party. As a result, a laboratory's decision not to subcontract may be viewed as "competition" with the private sector, rather than the act of entering into a subcontract, although this view overlooks the fact that the M&O contract itself is a contract with the private sector. The governing principles for subcontracting at DOE laboratories are effectuated by the inclusion in the M&O contract of the laboratory the clause found at DEAR Part 970.5204-22. M&O contract provisions also require laboratory contractors to develop "make-or-buy" plans for DOE Contracting Officers' approval. Make-or-buy plans generally establish a preference for providing supplies or services on a least cost basis.* The key principle of the make-or-buy program is to eliminate bias for in-house contractor performance and to focus on producing the supplies or services at least cost.

Subcontracts executed by Federal prime contractors are not subject to the FAR although certain Federal laws, Executive Orders and regulations may affect contractor purchasing and require the inclusion of FAR and DEAR clauses in laboratory subcontracts. Within DOE, M&O contractors are expected to apply "best commercial purchasing practices and procedures," and conform their purchasing practices to certain principles set out by DOE in regulation.* Among the principles expected to be applied by M&O contractors in their purchasing systems are: the acquisition of quality products and services at fair prices, the use of effective competitive techniques, and the facilitation of quality relationships with subcontractors, including the use of alternative dispute

* GOGO laboratories do not enter into subcontracts. They enter into prime contracts which are subject to the Competition in Contract Act of 1984, as amended, 41 U.S.C. 253 et seq., the FAR and the DEAR.

* DEAR Part 970.5204-76.

* See DEAR 970.7103, **Contractor Purchasing System**.

resolution techniques.*

B. OVERSIGHT MECHANISMS

DOE uses the following mechanisms to provide oversight of the M&O contractor activities discussed above.

M & O Contract Appraisals

In the past several years, DOE has converted its M&O contracts into performance-based contracts. Each year, DOE develops contract performance measures for each M&O contract, and performs annual appraisals of contractor performance based upon how well the contractor accomplishes the performance measures. There are measures that address facility science and research efforts and other measures that address management and business operations.

Office of Inspector General Audits

The Office of Inspector General (OIG) conducts performance audits of the laboratory contractors. The OIG may solicit DOE Management's suggestions for possible programs to audit. The OIG also implements a Cooperative Audit Strategy through which the OIG provides annual audit guidance to DOE Operations Offices, OIG staff, and contractor internal audit staff. This guidance identifies high-risk Departmental audit issues, which are treated as priority matters in the audit planning process. The OIG routinely conducts (1) an assessment of the M&O contractor's statement of costs incurred and claimed; and (2) an audit of the M&O contractor's financial statement. The OIG has audited selected elements of laboratory technology transfer and is available to perform audits of technology transfer activities.

Transaction Reviews

For Work For Other (WFO) agreements, DOE field offices must make determinations and certifications that proposed WFO agreements meet the criteria of DOE Order 481.1, Work for Others. This effort is incorporated into the DOE transactional review process for reviewing proposed WFO projects between laboratories and non-DOE sponsors. Also, standard terms and conditions for bilateral sales agreements with WFO sponsors are approved by DOE field offices. Some laboratories submit a Project Information Questionnaire that fully explains the project's objectives. Each project is approved by the Contracting Officer of the DOE field office. However, approval by the Contracting Officer for specific WFO terms and conditions is only necessary if they deviate from the standard terms and conditions previously approved.

* *Id.*

For Joint Work Statements (JWSs) and their corresponding CRADAs, DOE field offices include key considerations in their transactional reviews of proposed agreements. Reviews are performed using a standard procedure, such as following a checklist, which includes a listing of the considerations which must be addressed. The key considerations are based on DOE-wide policy guidance and include such items as impact on national security, fairness of opportunity, U.S. competitiveness, product liability, conflict of interest, and benefits to all parties. Approval of each JWS and CRADA is performed by the DOE Contracting Officer.

For laboratory subcontracts, each DOE field office manager in his/her capacity as Head of the Contracting Activity (HCA) establishes system-wide review and approval thresholds by subcontract type and dollar value for individual purchasing transactions of a contractor. Such thresholds are based on a number of considerations set forth in regulation, but typically the minimum dollar value for transaction reviews is \$25,000 and the maximum cannot exceed the delegated authority of the HCA. DOE performs a patent certification of all laboratory subcontracts to verify that all intellectual property developed during the subcontract has been reported to DOE.

GOGO laboratories have local procedures to assess appropriate considerations applicable in deciding whether to enter into a CRADA.

Contracting Officer Inquiries

The DOE Contracting Officer (CO) has oversight responsibility for all M&O contractor activities, and as such has authority to request information from the laboratories regarding any M&O contract activities. For example, if the Contracting Officer believes that a laboratory research project may be in violation of the contract, the Contracting Officer may request the laboratory to provide information the research project being performed. Depending on the outcome of the Contracting Officer's review of the project, the Contracting Officer will determine whether corrective actions are necessary.

Program Reviews

Each of DOE's program offices performs continual project monitoring of DOE-funded research activities of differing scopes and frequencies. The purpose of program reviews is to assess the laboratory's progress against DOE program goals, including reviews of other activities such as WFO or CRADAs as they relate to or have a significant impact on the laboratory's programs or infrastructure. Projects most likely to be reviewed are large dollar CRADAs or WFO agreements. Any high profile research activity where industry is a direct participant, or an entire industry could be impacted by such research, is very likely to be assessed at the program review, and issues concerning competition with industry could be raised in this forum.

In addition to DOE program reviews, some of the laboratories, such as Argonne, engage an independent scientific/technical peer review committee to evaluate the laboratory's programs. These committees, being comprised of university, other laboratory, and industrial participants are very interested in possible unfair competition by the laboratory (among other issues), and may address their concerns to the contractor and DOE in a formal report.

Business Management Oversight Process (BMOP) Reviews

BMOP is a logical outgrowth of DOE's implementation of Contract Reform. DOE Order 224.1, Contractor Performance-Based Business Management Process, provides DOE's policy on the process. BMOP has two components: (1) the headquarters functional office and program office mechanism for overseeing field office performance, and (2) the field office mechanism for overseeing contractor performance. DOE Order 224.1 contains a list of applicable functional areas for which performance measures and expectations, self assessments, and performance evaluations can be developed and conducted.

Contractor Licensing Transaction Reviews

M&O contracts require DOE Contracting Officers to review and approve all exclusive licenses for the contractor's Intellectual Property (developed at the laboratory) to any person who has been a contractor employee or consultant within the previous two years or to the company in which he or she is a principal. At each site, DOE has approved standard Intellectual Property licenses that the laboratories use in negotiating their agreements. However, DOE does not routinely perform transaction-specific review of licenses prior to execution, but may review any of the licenses after execution.

Contractor Patent Prosecution Reviews

M&O contractors do not have a statutory right, under the Bayh-Dole Act, to retain title to inventions made under DOE's naval nuclear propulsion or weapons programs. Pursuant to Advanced Class Patent Waivers, a DOE program official (field or HQ) must approve any request for waiver of title to a weapons-related invention by the laboratory. The request for waiver may be denied based on national security considerations or special circumstances related to specific predetermined areas of technology. The laboratory's patent preparation and prosecution before the U.S. Patent and Trademark Office (USPTO) is not monitored by DOE, except, pursuant to the Bayh-Dole Act, for the meeting of contract time limits for filing of patent applications, the inclusion of a statement of government interest in the patent specification, and the execution and delivery of a license confirming the government's rights in the invention.

Contractor Audits

Pursuant to standard M&O contract provisions, M&O contractors are responsible for conducting internal audits satisfactory to DOE of the records, operations, expenses and transactions of allowable costs. As part of this responsibility, M&O contractors prepare annual audit plans for each ensuing fiscal year in implementation of the Cooperative Audit Strategy of the Office of the Inspector General.

IV. GRIEVANCE AND DISPUTE RESOLUTION MECHANISMS RELATING TO LABORATORY TRANSACTIONS

If a third party believes it has been harmed by a laboratory's improperly competing with it, that party has a number of mechanisms available to it to seek to remedy the situation. These grievance and dispute resolution mechanisms can be generally divided into two major categories: (a) administrative mechanisms and (b) litigation. The first category of mechanisms is viewed to be the most effective means of resolving complaints in that the mechanisms in this category can be pursued easily with little cost, and resolution of problems often can be achieved most quickly. DOE also supports and encourages the use of alternative dispute resolution techniques, such as the use of third party mediation, as a part of any of the mechanisms discussed below.

A. ADMINISTRATIVE MECHANISMS

Complaints submitted to the Laboratory

The most often employed grievance mechanisms fall into this category. These mechanisms run a continuum of intensity, ranging from telephone inquiries to the lodging of formal written complaints. A firm that wishes to voice an objection also has the option of contacting (orally or in writing) the particular contracting or program representative at the laboratory responsible for the offending activity or of pursuing its objection up the management chain within the laboratory. Oftentimes, early communication between the laboratory and the private sector clarifies misunderstandings and informs one or both parties of the other's interests in a particular matter. Early attention can also facilitate the identification of solutions to problems before the parties' positions become polarized.

A firm that wishes to lodge a complaint or dispute should first contact the laboratory's functional office responsible for the particular activity. For example, if the matter relates to an activity under a CRADA, the firm should contact the laboratory's Technology Transfer Office. Similarly, if the activity relates to a subcontract or purchase order, the firm should contact the laboratory's Procurement Office. If a firm is having difficulty in determining the proper office within the laboratory, reference to the laboratory's internet home page may assist its search, since many of the home pages identify the laboratory organizations as well as specific offices or officials responsible for dealing with complaints or assisting firms in doing business with the laboratory.

The Department by regulation has set out its policies relating to the purchasing systems established by the management and operating contractors*, and these policies include a provision that "[w]here specific requirements do not otherwise apply, the contractor purchasing system shall provide for appropriate measures to ensure the: ... Reduction of performance risks associated with subcontractors, and facilitation of quality relationships which can include techniques such as partnering agreements, ombudsmen, and alternative disputes procedures." In response to this requirement, the M&O contractors have established their own systems for encouraging productive relationships with their purchasing partners. These include, for example, ombudsman (e.g., Westinghouse Savannah River Company), appeals from decisions of the procurement representative's decision to the Procurement Manager (e.g., Bechtel Jacobs at Oak Ridge, Bechtel Nevada), non-binding Alternative Dispute Resolution (e.g., Bechtel Nevada), and referral to the site's Advocate for Best Business Practices (e.g., National Renewable Energy Laboratory). Inquiries can be made to the M&O organization to determine the procedures used at any particular site.

In the technology transfer arena, internal procedures tend to be less formalized. However, avenues of raising grievances may be established in the vehicle through which a firm may be interacting with the laboratory. For example, the model CRADA approved by DOE contains a disputes clause that would typically set out the avenues for filing claims with the laboratory under the CRADA.

Complaints to the Cognizant DOE Operations Office or Assistant Secretary

This mechanism also can be used at different organizational levels within the Department and is routinely used by the private sector. This mechanism can be invoked both orally and in writing. While the Department's first course of action often will be to refer the party or its complaint to the responsible laboratory to ensure that the laboratory has the opportunity to address the complaint in the first instance, the Department will examine complaints, as appropriate, to ensure that the laboratories remain responsible for complying with all applicable legal, regulatory and contractual requirements. When the Department engages in such a role, it is performing its contract oversight function and DOE's efforts are aimed at facilitating resolution by the M&O contractor and the complaining private sector participant.

* DEAR 970.7103.

Complaints to the DOE Inspector General

The Department's Office of the Inspector General (OIG) is responsible, among other things, for examining allegations of waste, fraud, or mismanagement in DOE programs or operations. A party thus is able to contact the OIG either formally or through the OIG's hotline*, with complaints that may fall into these areas.

Administrative Claims to DOE for Patent or Copyright Infringement

DOE has established, through regulation, an administrative process for the resolution of claims of patent or copyright infringement.* Thus, a third party who believes that the Department, either directly or through one of its laboratories, has infringed the third party's privately owned rights in patented inventions or copyrighted works may submit a claim to the Department pursuant to these regulations. This process permits the complaining party to present its allegations to the Assistant General Counsel for Technology Transfer and Intellectual Property, who independently examines the allegations. Subject to the availability of appropriated funds, the Assistant General Counsel may recommend the payment of compensation by a DOE program office or a M&O contractor.

Filings at the Patent and Trademark Office

The U.S. Patent and Trademark Office (PTO) is statutorily established to consider patent and trademark applications, and issue patents and trademarks when determined to be appropriate.* The procedures which govern the PTO's practices describe the mechanisms through which third parties may challenge the actions of another, with the principal mechanisms being a Protest and a Request for Reexamination:

(i) Protests

Any member of the public, including private persons, corporate entities and government agencies, may file a protest under 37 C.F.R. 1.291 against pending patent, reexamination or reissue applications. Protests may be filed by a representative on behalf of an unnamed principal. Protests can rely on any information which, in the view of the protester, would make the granting of a patent improper. A limitation of this mechanism is that, under U.S. patent law, original pending patent applications are not publicly available, but are considered proprietary to the person or entity filing the application. Thus, a potential protester does not generally have knowledge

* See DOE's OIG web page (www.hr.doe.gov/ig/mainhome.html) under the listing for the Office of Inspector General.

* See 10 C.F.R. Part 782.

* See 35 U.S.C. 1 for Patents and 35 U.S.C. 1051 for Trademarks.

relating to the original pending patent application. Once issued, however, the patents are public information. Because reissue and reexamination applications derive from publicly available issued patents, reissue and reexamination protests can be more easily used by third parties as grievance mechanisms.

(ii) **Request for Reexamination**

If a third party believes on the basis of "prior art"* that a patent being licensed by the Government or the laboratories should not have been issued by the PTO, that person may at any time file a "request for reexamination" by the PTO of any claim of a patent.* The process initiated by the request for reexamination enables the third party to challenge any claim contained within the issued patent and effectively requires the patent holder to defend the patentability of the patent in light of the cited prior art. While requiring the use of a patent attorney, this process is relatively inexpensive and quick, and can provide an effective remedy for those believing that a party was improperly granted a patent.

Protests

Pursuant to the Competition in Contracting Act, the Comptroller General of the United States is authorized to hear protests by interested parties of alleged violations of a procurement law or regulation occurring in the context of a Federal procurement.* Thus, for example, in the situation where an aggrieved party believes that a laboratory is competing against the private sector in violation of law or regulation by responding to a Federal solicitation, the party may be able to file a protest at the General Accounting Office (GAO). GAO protests take the form of quasi-administrative litigation, and GAO has a statutory goal of resolving protests in one hundred calendar days from the date of protest filing.* Also available, at the discretion of GAO, is an "express option" under which a decision on the merits of a protest is issued within sixty-five calendar days. Because under the statute a procurement may be suspended during the pendency of the protest depending on the timing of the protest filing (unless the head of the procuring activity makes a written determination to override the suspension), a timely protest can provide an aggrieved party the opportunity to have its allegations heard before the procurement goes forward. If a protest is sustained by the GAO, there are a number of remedies it may

* The term "prior art" is a term of art used in patent law to describe the patents or "printed publications" which have a bearing on the patentability of any claim of another.

* See 35 U.S.C. 302.

* Pub. L. No. 98-369, 98 Stat. 1175 (1984); see 31 U.S. C. 3551-3556. The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (FASA), retained the bid protest system and made certain refinements. For the procedures governing protests filed at the General Accounting Office, see 4 C.F.R. Part 21. Protests relating to laboratory subcontracts, CRADAs, WFOs and licenses are not subject to the Comptroller General's bid protest authority.

* See 31 U.S.C. 3554.

recommend*, including the termination of a contract, recompetition of a contract, issuance of a new solicitation, and the payment of attorney fees (in appropriate cases).

Pursuant to FAR Subpart 33.1, the Department has issued regulations* which describe the procedures to be followed for agency protests and protests filed at the GAO. Agency protests procedures are designed to provide an informal and expeditious resolution of protests.

B. Litigation

Although expensive, time-consuming, and often not successful in terms of reaching the desired results, litigation is an available grievance mechanism in cases where a third party can establish a cause of action and harm. While there are many federal and state statutes which conceptually could give rise to a cause of action, they are highly fact dependent. Set out below are some of the possible forms such actions could take.

Actions under U.S. Patent Law

(i) Patent Infringement

As discussed in Section III, a patent is a right to exclusive use granted by the federal patent statutes, and patent law authorizes a patentee or its licensees to bring suit to exclude others from making, using or selling the invention at issue.* Successful actions in this area may result in the issuance of an injunction preventing the patent infringer from future infringement activities and compensation for the damage resulting from the infringement activities. However, under the patent statutes, a patentee will not necessarily have the right to make, use or sell his/her own invention if the invention is an improvement patent (i.e., an improvement of an invention owned by another party), and the holder of the improvement patent does not have rights in the underlying patent necessary to practice the improvement patent. Oftentimes, cross-license agreements are entered into in this situation so that a patentee of the underlying patent agrees to forgo his/her claim for patent infringement and authorizes the holder of the improvement patent to infringe on the claims of his/her patent. Suits for infringement against the U.S. Government, including for claims of infringement by Government contractors acting for the Government and with the Government's authorization or consent, must be brought in the U.S. Court of Federal Claims.*

* In order to avoid constitutional issues, FASA grants GAO authority to issue recommendations rather than impose the remedies themselves. In practice, GAO recommendations are usually followed by the various agencies absent compelling circumstances.

* See DEAR Subpart 933.1.

* See 35 U.S.C. 271(a).

* See 28 U.S.C. 1498.

The party accused of infringement may raise the validity of the patent as a defense. This includes questioning the conduct of the patent owner in obtaining the patent.

(ii) Challenge of the Validity of a Patent

There are a variety of actions available in U.S. courts related to patents, copyrights and trademarks. It is beyond the scope of this Report to list all of the possible actions available. Court review of all final actions of the Patent and Trademark Office is available to the patent applicant under 35 U.S.C. § 141. The owner of a patent who believes the patent of another has interfering claims can bring action in federal court under 35 U.S.C. § 291. Patent misuse is a doctrine of Antitrust law which addresses prohibited actions by patent owners in exploiting their patent.

Federal Procurement Protests

In addition to GAO's quasi-administrative jurisdiction over bid protests (*see* 31 U.S.C. 3551-3556 and 4 C.F.R. Part 21) and the agencies' own bid protest procedures (*see* FAR Subpart 33.1 and agency FAR supplements), the Court of Federal Claims and the U.S. District Courts currently have jurisdiction to hear protests pursuant to the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. Law 104-320. (Under the ADRA, District Court jurisdiction is scheduled to sunset at the end of 2000 absent further action by Congress). The ADRA provides for both pre- and post- award review of objections by interested parties to Federal agency solicitations or bids or proposals, proposed awards or awards, and any alleged violation of statute or regulation in connection with a procurement.* There is no requirement to exhaust administrative remedies before filing in federal court, and a party can file in court after a GAO or agency protest decision. The ADRA expressly requires use of the Administrative Procedure Act standard of review found at 5 U.S.C. 706.

V. POWER MARKETING ADMINISTRATIONS (PMAs)

Bonneville Power Administration

In 1937, Congress with the Bonneville Project Act, 16 U.S.C. § 832 *et seq.*, created the Bonneville Power Administration (BPA) to market the power from the Corps of Engineer's Bonneville Dam. BPA was given two major purposes: 1) to market power, 16 U.S.C. § 832a(a); and 2) to "provide, construct, operate, maintain and improve" the transmission system necessary to market the power, 16 U.S.C. § 832a(b). Over the years, other Acts of Congress reiterated and refined these two purposes: Federal Columbia River Transmission System Act (Transmission System Act), 16 U.S.C. § 838 *et seq.*; Pacific Northwest Consumer Power Preference Act (Preference Act), 16 U.S.C. § 837 *et seq.*; and Pacific Northwest Power Planning and

* 28 U.S.C. 1491(b)(1).

Conservation Act (Northwest Power Act), 16 U.S.C. § 839 *et seq.* The following discusses BPA's two purposes.

Power Marketing

BPA markets electric power from 29 Corps of Engineers and Bureau of Reclamation hydro projects and some non-federal projects. 16 U.S.C. § 838f. Federal law prohibits BPA from owning electric generating facilities. 16 U.S.C. § 839a(1). The Corps and the Bureau develop operating requirements for their projects, consistent with the Bonneville Power Act and other statutory requirements. It is within these limits that BPA schedules and dispatches power.

BPA's primary service area is the Pacific Northwest, comprised of Oregon, Washington, Idaho, western Montana and portions of California, Nevada, Utah and Wyoming. BPA's power sales account for approximately 40 percent of the electric power consumed in the Pacific Northwest.

Statutes require BPA to offer contracts to publicly-owned and investor-owned utilities to serve their net requirements in the region. 16 U.S.C. § 839c(b)(1). The calculation of net requirements is based on the difference between the utility loads and nonfederal resources applied to load. Publicly-owned utilities, either public bodies or cooperatives, are granted preference in the sale of BPA power. 16 U.S.C. § 839c(a). BPA must retain the right to cancel a power sale to an investor-owned utility on five years' notice to serve the net requirements of a publicly-owned utility. BPA may sell its power under contracts no longer than 20 years in duration. 16 U.S.C. § 832d(a).

BPA also sells Federal power to certain industries in the region known as direct service industrial customers. 16 U.S.C. § 839a(8). After current contracts with these customers expire, BPA sales to these industries will be discretionary. BPA has authority to purchase power to meet short-term power deficiencies, 16 U.S.C. § 838i(b)(6), and to acquire resources on a long-term basis to meet its regional firm contractual obligations, 16 U.S.C. § 839d(a)(2).

Power that is surplus to BPA's contractual obligations to utilities and direct service industrial customers may be sold in and outside the region. 16 U.S.C. § 839c(f). Often these sales are to marketers. BPA also participates in the California Power Exchange, selling power and ancillary services at the market-clearing price.

Rates for the sale of BPA power are designed under specific statutory directives and established in a contested case proceeding. 16 U.S.C. § 839e(b), (i). BPA must set its rates to recover its total system costs and assure timely repayment of the Federal investment in the power system. BPA's rates are filed for approval by the Federal Energy Regulatory Commission which reviews and approves the rates for revenue sufficiency. 16 U.S.C. § 839e(a)(2).

As part of BPA's power marketing responsibilities, the Northwest Power Act directed BPA to encourage the development of electric energy conservation and renewable energy resources. 16 U.S.C. § 839(1). BPA was encouraged by Congress to provide technical and financial assistance, and other cooperation with customers and governmental authorities for cost effective conservation. 16 U.S.C. § 839d(a)(1) In addition, BPA has provided assistance to other Federal agencies to meet their goals for energy conservation under the Energy Policy and Conservation Act of 1992. 42 U.S.C. § 6201 *et seq.* For further discussion of BPA's energy efficiency efforts see 1998 House Energy and Water hearing record pages 1310-1311. *Energy and Water Development Appropriations for 1999: Hearing on Power Marketing Administrations Before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations*, 105 Cong., 2nd Sess. 1021, 1310-11 (1998) (statements of Jack Robertson, Acting Administrator, BPA). In response to concerns about BPA energy efficiency efforts, the Comprehensive Review of the Northwest Energy System established 13 principles by which BPA conducts its energy efficiency efforts. In addition, BPA has established five additional principles to guide its energy efficiency efforts at Federal facilities outside of the Pacific Northwest. These principles are attached as Appendices C and D. Appendix E is a matrix of the PMA's statutory and regulatory authorities.

Transmission System

To fulfill its second purpose, to provide the transmission system to market the power, BPA has constructed, owns, operates and maintains a transmission system spanning a 300,000 square mile service territory. This system is over three-quarters of the high voltage transmission in the Pacific Northwest. The system consists of over 15,000 circuit miles of transmission lines on 220,000 acres of either fee-owned or easement acquired rights-of-way, over 360 substations, various other building, and hundreds of thousands of pieces of equipment and vehicles. An integral part of the transmission system is the communications system necessary to control and monitor the equipment. In the past, this system was based on analog microwave technology, but that outdated system is currently being replaced by fiber optic technology. BPA is designing and installing this fiber optic system on its transmission rights-of-way to meet its current and long-term operational needs. BPA utilizes its broad contracting and procurement authority to contract out substantial portions of its fiber optic construction. BPA's rights-of-way create the opportunity for fiber optic resources to be developed by private telecommunications firms in the region. In this respect, BPA wants to support the development of the information super highway by creating opportunities for the private sector to develop the commercial market. In leasing excess fiber optic capacity, BPA is not competing with private telecommunications firms. BPA is not selling telecommunications services. Excess BPA dark fiber is being leased to private telecommunications firms until it is required for BPA operational needs. Dark fiber is non-working fiber optic cable that has not been lighted by any user to provide telecommunications services. BPA's dark fiber optic leases fall within BPA's statutory authority to lease personal property. BPA's dark fiber leases do not include BPA provision of lit telecommunications services. Such lit services are provided by the private telecommunication firms that lease BPA's excess dark fiber for their own commercial purposes. Consistent with Section 704 of the

Telecommunications Act of 1996 (and the Presidential Memorandum prior to that Act) and the GSA Bulletin FPMR D-242, BPA makes its property available to private telecommunications firms for the siting of antennas. As with all other revenues received by BPA, funds from fiber leases and siting of antennas are credited to the BPA Fund within the Treasury of the United States. 16 U.S.C. § 838i. In addition, consistent with FERC Order 888, BPA's transmission business line offers ancillary services necessary to for the effective transmission of energy in the region. These ancillary services are provided under FERC approved rates.

To carry out its transmission system purpose, BPA has broad contracting authority and is not subject to most general procurement statutes that are applicable to other Federal agencies. The Bonneville Project Act grants BPA the authority to acquire, dispose of and lease real and personal property, 16 U.S.C § 832a(c)-(e), and to contract for supplies and services, 16 U.S.C. § 832a(f). With regard to Section 832a(e), BPA received explicit recognition of its authority from the President on April 11, 1994. Under Section 832a(e), BPA has authority to sell, lease or otherwise dispose of property in connection with construction or operation of its electric transmission system. The Bonneville Project Act was designed to give the Administrator the authority to operate BPA in a business-like manner similar to other public utilities. The Transmission System Act grants authority to BPA to make non-major transmission expenditures without appropriations from Congress or limitation to a fiscal year. 16 U.S.C. § 838i(b). The Northwest Power Act reaffirmed the need for the special contracting authorities in the Bonneville Project Act. 16 U.S.C. § 839f(a). BPA utilizes these authorities to contract major substation and transmission line construction to the private sector. BPA also contracts with the private sector for some of the maintenance and repairs of its facilities.

BPA is authorized to issue its own purchasing instructions based on the broad authorities of the Bonneville Project Act. BPA's purchasing instructions (BPI) draw on the best purchasing techniques available from both government and commercial sources. The BPI is designed to obtain the best buy for each dollar spent.

BPA pursues its purchasing activities in a commercial manner including treating offerors, potential offerors, and contractors fairly and with equity. BPA has established policy and procedures that an offeror or contractor can follow to challenge BPA contracting decisions. BPA attempts to resolve contract claims or disputes by mutual agreement between the parties. If a claim or dispute cannot be resolved by mutual agreement, the contractor may seek arbitration or mediation to resolve the dispute, or submit the claim to the Department of Energy's Board of Contract Appeals. Contractors may also elect to file a claim in the courts.

Southeastern Power Administration

Southeastern Power Administration (Southeastern) is headquartered in Elberton, Georgia. Southeastern markets hydropower power and energy generated at 23 Corps of Engineer projects in the Southeast, to public bodies and cooperatives in eleven southeastern states and Illinois. During FY 1997, wholesale power consisting of approximately 8.1 billion kilowatt hours of

energy and 3 million kilowatts of capacity was marketed to more than 306 customers consisting of public bodies and municipals and cooperatives. Such power averages approximately 5 percent of the power needs of the various customers and replaces power the customers would otherwise purchase from area investor-owned and public utilities.

Southeastern is a transmission-dependent all hydroelectric utility which maintains 18 contracts with private and public transmission providers for transmission and ancillary services to carry out its statutorily authorized power marketing program in the Southeast. Although Southeastern provides some of its own ancillary services, it does not market any ancillary services. Also, Southeastern is not involved in the procurement or installation of fiber optic lines or facilities in its marketing area. Southeastern does maintain a Competitive Resource Strategies program which supports its customer's efforts to use Southeastern's hydropower resources more efficiently by co-sponsoring or facilitating workshops that promote energy and economic efficiency. The workshops are delivered by private sector vendors who include utility consultants, trade groups and investor owned utilities.

Southeastern's marketing programs are authorized under the provisions of section 5 of the Flood Control Act of 1944, 16 U.S.C. Section 825s, as well as provisions of the Department of Energy Organization Act of 1977, 42 U.S.C. 7152.

Southeastern does not have any formal grievance procedures as such. Its power marketing programs are carried out pursuant to published power marketing policies formulated through a public participation process that includes public forums and a period to receive public comments. Entities who believe that Southeastern may be unfairly competing or be operating beyond its statutory authorities can raise those issues and seek redress during public power marketing processes, with Southeastern's Administrator, the Deputy Secretary of Energy or the Secretary of Energy. Likewise, such issues can be aired before Congressional oversight committees or through litigation in the U.S. District Courts.

Southwestern Power Administration

Southwestern Power Administration markets and delivers federal hydroelectric power and repays to the U.S. Treasury the power investment in the federal dams in the Southwest. To the extent Southwestern would be considered to be in competition with the private sector by virtue of its Federal hydropower delivery operations, express authorization is provided by Section 5 of the Flood Control Act of 1944 (Section 5). Section 5 directs that power and energy generated at projects under the control of the Department of the Army not required for the operation of such projects be disposed of in sales to public bodies and cooperatives.

Southwestern performs some work for others, generally reimbursable work such as line relocations and other work necessary and incidental to the operation of a transmission system. Southwestern's authorized relationship with its preference customers results in some additional services being offered to these customers because the services enhance Southwestern's ability to

meet its primary mission. "Ancillary Services" include scheduling, dispatching, system voltage control, load control, energy imbalance, spinning reserve, and supplemental spinning reserve. Southwestern's non-power operations, such as the development of a communications system, are conducted in a manner consistent with the "sound business principle" mandate of Section 5. Installation of fiber optics supports the transmission system operation and enhances safety and reliability. There are limited opportunities where Southwestern can save costs by working with an adjoining utility system in an exchange of the use of dark fiber. Southwestern follows standard Federal procurement policies and contracts out most major construction work to the private sector. Southwestern itself performs routine transmission line operation & maintenance. In all instances, Southwestern consistently and aggressively seeks to carry out its operations in the most cost effective method possible, consistent with good utility practice.

Western Area Power Administration

Western Area Power Administration (Western) has a primary mission **B** the sale and transmission of electric power to preference customers **B** that is itself a form of technology transfer to the private sector. This mission is specifically authorized by statute. (Reclamation Act of 1902 (32 Stat. 388); Reclamation Project Act of 1939 (53 Stat. 1187); Flood Control Act of 1944 (58 Stat. 887); Department of Energy Organization Act of 1977 (42 USC § 7152, Pub.L. 95-91, 91 Stat. 565))

In carrying out its mission, Western uses authorizations available to it to maximize efficiency. Western enters into *Work for Others* agreements (described above in greater detail), particularly with the other PMAs, most notably in the areas of engineering design and construction. Additionally, Western's authorized relationship with its preference customers results in some additional services being offered to these customers because the services enhance Western's ability to meet its primary mission. "Ancillary Services" are the best example, and they include: (1) Scheduling, System Control and Dispatch Service; (2) Reactive Supply and Voltage Control from Generation Sources Service; (3) Regulation and Frequency Response Service; (4) Energy Imbalance Service; (5) Operating Reserve **B** Spinning Reserve Service; and (6) Operating Reserve **B** Supplemental Reserve Service (collectively "A/S"). The laws of physics make A/S an integral byproduct to, and necessity for, the generation and transmission of power. If Western does not offer A/S, its generation and transmission assets are significantly diminished.

Western's voluntary compliance with FERC's "Open Access" policies (FERC Order 888) in filing an Open Access Tariff (OAT) requires Western to provide A/S, and could eventually result in Western being asked by non-preference customers for equivalent service. The most immediate place this could occur would be in the restructured California market, where Western is currently serving as a Scheduling Coordinator for some preference customers. It is not inconceivable that a non-preference customer, for example, a new generator interconnected into Western's transmission system, could request (by a § 211 of the Federal Power Act request, and under the OAT) this service.

Increases in technology impact the electrical industry. For example, communications (the A/S of scheduling) between substations along transmission lines are now done over fiber optic cables. The nature of fiber optic cable (increasingly wide bandwidth relative to the cost of installation) can present opportunities for joint ventures, where Western and the others share use and ownership of fiber optic cable in Western's rights-of-way. For cost saving benefits, Western enters into these joint ventures, using their portions of the fiber optics for communication between substations. This allows Western to operate and maintain a safe reliable transmission system. It should be noted that Western follows standard Federal procurement policies and contracts out major substation and transmission line construction to the private sector. Western itself performs routine maintenance and upkeep of the transmission system.

Lastly, another new technology B mobile telephones B along with the Telecommunications Act of 1996, resulted in a Presidential Memorandum (1995) encouraging federal agencies to make their property available for the siting of antennas by private firms. Western's property (transmission rights-of-way) is particularly suited for this purpose, and correspondingly, Western has seen significant interest in this area.

PMA Grievance Procedures

Contractors generally may seek mediation to resolve dispute or submit the claim to the Department of Energy's Board of Contract Appeals. Contractors may also elect to file a claim in federal courts.

As indicated in Southeastern's report language, entities who believe that any power marketing administration may be unfairly competing or be operating beyond its statutory authorities can raise those issues and seek redress during public power marketing processes, with the PMA Administrator, the Deputy Secretary of Energy or the Secretary of Energy. Likewise, such issues can be aired before Congressional oversight committees or through litigation in the U.S. District Courts.

APPENDIX A

LIST OF DOE LABORATORIES HAVING
TECHNOLOGY TRANSFER AUTHORITY
AND POWER MARKETING ADMINISTRATIONS

Following is a listing of DOE facilities that have or are proceeding to obtain Technology Transfer as a mission and/or authority to enter into CRADAs or other technology transfer mechanisms.

Government Owned Contractor Operated (GOCO) facilities

Ames Laboratory
Argonne National Laboratory
Brookhaven National Laboratory
Thomas Jefferson National Accelerator Facility
Fermi National Accelerator Laboratory
Idaho National Engineering & Environmental Laboratory
Lawrence Berkeley National Laboratory
Lawrence Livermore National Laboratory
Los Alamos National Laboratory
National Renewable Energy Laboratory
Oak Ridge National Laboratory
Pacific Northwest National Laboratory
Princeton Plasma Physics Laboratory
Sandia National Laboratories
Savannah River Technology Center
Stanford Linear Accelerator Center
Kansas City Plant
Pantex Plant
Rocky Flats Environmental Technology Site
Oak Ridge Y-12 Plant
Nevada Test Site
East Tennessee Technology Park
Hanford Site

Government Owned Contractor Operated (GOGO) facilities

Federal Energy Technology Center
Albany Research Center
Environmental Measurements Laboratory
New Brunswick Laboratory
Radiological and Environmental Services Laboratory
Naval Petroleum & Oil Shale Reserve - Wyoming

Following is a list of the DOE Power Marketing Administrations.

Bonneville Power Administration
Southeastern Power Administration
Southwestern Power Administration
Western Area Power Administration

APPENDIX B

Laboratory Statutory Authorities and Regulations

LABORATORY AUTHORITIES

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Work For Others	<ul style="list-style-type: none"> • Economy Act (31USC 1535) • Intergovernmental Cooperation Act (Pub.L.90-577) (31 U.S.C.6501-06) • Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.) • Non-Nuclear Energy Research and Development Act (42U.S.C. Sections 5901-5915) <p>*ADR is Available at any time</p>	<ul style="list-style-type: none"> • Federal agency to provide goods and services for another Federal Agency • Federal agency may provide services to state and local government • AEC may assist private parties through use of AEC facilities • Authorizes DOE programs to focus on commercial applications to make DOE technologies available to the commercial market 	<ul style="list-style-type: none"> • When not available as conveniently or cheaply from commercial sources • When state requests such services and pays all costs • If private facilities are inadequate 	<p>DOE Order 481.1</p> <ul style="list-style-type: none"> • Work complementary to DOE • No adverse impact • No direct competition with private sector • No future burden on DOE • Contractors may not respond to RFP's 	<ul style="list-style-type: none"> • Telephone inquiries or Letters of complaint to Laboratory Personnel, DOE Operations Offices, Secretary of Energy, Congress, GAO • IG Hotline to report waste, fraud, or mismanagement • FOIA B mechanism to request Government documents • GAO Protest
Work for	<ul style="list-style-type: none"> • FAR part 17.5, "Interagency Acquisitions Under the Economy 	<ul style="list-style-type: none"> • FFRDC may perform non-DOE 	<ul style="list-style-type: none"> • Non-DOE Federal 		

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Others	<p>Act"</p> <ul style="list-style-type: none"> FAR Part 35, "Federally Funded Research and Development Centers" 	<p>sponsored work</p>	<p>sponsor required to make determination and finding (D&F) that the requested work will not place DOE lab in competition with the private sector</p> <ul style="list-style-type: none"> FFRDC may perform Work for Others if not otherwise available from private sector Agency policy procedures prohibiting its FFRDC from competing with any non-FFRDC concern in response to RFP's 	<ul style="list-style-type: none"> DOE Order 481.1 Work for Others Contractors may not respond to RFPs; are permitted to respond to Board Agency Announcements 	
Work for	<ul style="list-style-type: none"> 48CFR970.73, "Technology 	<ul style="list-style-type: none"> WFO is a Tech Transfer tool 	<ul style="list-style-type: none"> Must notify sponsor of option to do CRADA 		

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Others	Transfer Mission"		<ul style="list-style-type: none"> • Must comply with class patent waiver for WFO 		

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
CRADAs	<ul style="list-style-type: none"> Stevenson-Wydler Technology Innovation Act of 1980, 15 USC 3710a (as amended) 48 CFR 970.73 (DEAR Part 970.5204-40) Technology Transfer Mission <p>*ADR is Available at any time</p>	<ul style="list-style-type: none"> Federal facilities (GOGOs and GOCOs) may enter into CRADAs DOE can contribute DOE funds, facilities, and staff to CRADA projects Lab Director can enter into CRADAs Implements 15 U.S.C. 3710a Agency Head to facilitate collaboration to 	<ul style="list-style-type: none"> U.S. preference Consistent with laboratory mission Fairness of opportunity Use of royalties or other income as a result of technology transfer activities specified. Special consideration to small business firms Prohibition from disclosing properly marked proprietary information received from third parties Must notify sponsor of option to do WFO 	<p>Modular CRADA Policy Guidance (internal guidance last updated 12/95)</p> <ul style="list-style-type: none"> 2/10/93 agency policy issued on US Competitiveness from DOE's Director of Technology Utilization 1995 Technology partnership Selection Criteria issued by TP-1 on 5/23/95 	<ul style="list-style-type: none"> Letters of complaint To Laboratory Personnel. DOE Operations Offices, Secretary of Energy, Congress, GAO IG Hotline to report waste, fraud, or mismanagement FOIA B mechanism to request Government documents

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
CRADAs	<ul style="list-style-type: none"> Executive Order 12591, 4/10/87 	<p>assist in the transfer of technology to the marketplace</p> <p>Delegates authority to GOGO labs to enter into CRADAs</p>			

Mechanism	Statutory Authorities and Regulations	Authorizations and Permissions	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Licensing <ul style="list-style-type: none"> Inventions 	<ul style="list-style-type: none"> Atomic Energy Act (42 USC 2011 et seq.) Non-nuclear Energy Research and Development Act (42 USC 5901-5915) Bayh-Dole Act of 1980, as amended in 1984 (35 USC 200 et seq.) <p>*ADR is Available at any time</p>	<ul style="list-style-type: none"> Authorizes waiver of invention rights to the M&O contractor Authorizes waiver of invention rights to the M&O contractor Non-profit and small business M&O Operators may elect to retain title to new inventions 	<ul style="list-style-type: none"> Effect on competition considered in waiver grant March-in rights 35 U.S. 203 Preference for licensing of small business firms 35 USC 202(c)(7)(D) Preference for U.S. Industry 35 USC 204 	<ul style="list-style-type: none"> DOE waiver regulation 10 CFR 784 	<ul style="list-style-type: none"> Telephone inquiries or letters of complaint to Laboratory Personnel, DOE Operations Offices, Secretary of Energy, Congress, GAO IG Hotline to report waste, fraud, or mismanagement FOIA B mechanism to request Government documents Patent and Trademark Office

Mechanism	Statutory Authorities and Regulations	Authorizations and Permissions	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Licensing <ul style="list-style-type: none"> Inventions 	<ul style="list-style-type: none"> Federal Technology Transfer Act of 1986 (amending Stevenson-Wydler) (P.L.99-502, 15 USC 3701 et seq.) National Technology Transfer and Advanced Act of 1995(amending Stevenson-Wydler) (P.L.104-113, 15USC3710 et seq.) <p>*ADR is Available at any time</p> <ul style="list-style-type: none"> Executive Order 12591 (April 10, 1987) 	<ul style="list-style-type: none"> Delegated authority to GOGOs to license inventions Provided for the private sector CRADA partner to obtain, as a minimum; the option for an exclusive license in a field of use for any Lab invention made under the CRADA Encouraged technology transfer by directing 	<ul style="list-style-type: none"> Restrictions on licensing of federally owned inventions 35 USC 209 applies to licensing of GOGO inventions Subject to Department of Commerce licensing regulations, 375 CFR 404, public notice of exclusive licenses 	<ul style="list-style-type: none"> DOE licensing regulations at 10 CFR 781 supplement DOC regulations 	Reexamination 35 USC 302 B after patent has been issued <ul style="list-style-type: none"> Litigation: patent validity, non-infringement, anti-trust

Mechanism	Statutory Authorities and Regulations	Authorizations and Permissions	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Licensing <ul style="list-style-type: none"> Inventions 	<ul style="list-style-type: none"> DOE Acquisition Regulation DEAR 970.27 DOC Bayh-Dole Regulations 37 CFR 401 et seq. Technology Transfer Clause DEAR 970.5202-40 <p>*ADR is available at any time</p>	delegation to GOGOs to license or waive invention rights <ul style="list-style-type: none"> Patent Rights clause provides Bayh-Dole rights to non-profit M&O Contractors Under 35 USC 206, Department of Commerce issues regulations governing title to and licensing of inventions by DOE laboratories 		<ul style="list-style-type: none"> Patents Rights Clause incorporates through a class waiver issued to a large business M&O operators the following: <ul style="list-style-type: none"> March-in-rights of 35 USC 203 Preference for U.S. Industry 35 USC 204 U.S. Competitiveness Authorizes licensing of inventions as an activity under the contract Requires conflict of interest procedures Provides for fairness of opportunity Provides for U.S. 	<ul style="list-style-type: none"> DOE maintains a publicly available record of waiver determinations

Mechanism	Statutory Authorities and Regulations	Authorizations and Permissions	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Licensing <ul style="list-style-type: none"> Inventions 				competitiveness <ul style="list-style-type: none"> For privately funded technology transfer licensing, fairness of opportunity and U.S. Competitiveness do not apply under Bayh-Dole Contractor performance in technology transfer is evaluated in annual appraisals. 	

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Licensing <ul style="list-style-type: none"> • Technical Data and Software • Trademarks • Mask works • Bailments 	<ul style="list-style-type: none"> • Copyright Law (17 U.S.C. 101 et seq.) • National Competitiveness Technology Transfer Act of 1989 (P.L. 101-189) (15 U.S.C. 3710a) • DOE Acquisition Regulation DEAR 970.2705 <p>*ADR is Available at any time</p>	<ul style="list-style-type: none"> • Copyright vests in authors or authors' employers • Provided for protection from disclosure for a period of up to five years for any data generated under a CRADA • Authorizes Labs to copyright and license software 	<ul style="list-style-type: none"> • Data available to the public after a maximum of five years 	<ul style="list-style-type: none"> • Technology Transfer Clause 970.5204-40 • Authorizes licensing 	<ul style="list-style-type: none"> • Telephone inquires or letters of complaint to Laboratory Personnel, DOE Operations Offices, Secretary of Energy, Congress, GAO • IG Hotline to report waste, fraud, or mismanagement • FOIA B mechanism to request Government documents • Opposition proceeding in Patent and

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Licensing <ul style="list-style-type: none"> • Technical Data and Software • Trademarks • Mask works • Bailments 	<p>*ADR is Available at any time</p>			<ul style="list-style-type: none"> and bailments and protection of trademarks, mask words, and other protected intellectual property • Requires conflict of interest procedures • Provides for fairness of opportunity • Rights in Data B Technology Transfer Clause DEAR 970.5204-83 • Permits assertion of copyright in scientific and technical articles B but these are published in the open literature • Permits assertion of copyright in technical data and computer software upon approval of DOE with limited DOE rights to publish • Must obtain permission of any other (non-DOE) 	<ul style="list-style-type: none"> Trademark Office to an application for Trademark • Challenge to the validity of the copyright or trademark in litigation, any time after the IP protection is effected
Licensing					

Mechanism	Statutory Authorities and Regulations	Authorizations	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
<ul style="list-style-type: none"> • Technical Data and Software • Trademarks • Mask works • Bailments 				<p>funding source</p> <ul style="list-style-type: none"> • Subject to a Government purpose license for 5 years or an extended period approved by DOE • After period, Government license is broadened to permit exercise of right by others • Licensing subject to the Technology Transfer clause 	

Mechanism	Statutory Authorities and Regulations	Authorizations and Permissions	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Subcontracting	<ul style="list-style-type: none"> • Atomic Energy Act (42 USC2001 et seq.) • Non-nuclear Energy Research and Development Act (42USC5901-5919) • Bayh-Dole Act of 1980 as amended in 1984 (P.L. 96-517; P.L. 98-620: 35USC200 et seq.) • Federal Acquisition Regulation • Department of Energy Acquisition Regulation <p>*ADR is Available at any time</p>	<ul style="list-style-type: none"> • Applicable to Government Operated facilities • Contractors operating facilities may but are not required to follow the FAR (except those reflecting statutory and regulatory requirements) • DEAR 970.71 Management and Operating (M&O) Contractor Purchasing 	<ul style="list-style-type: none"> • M&O purchasing to apply "best commercial purchasing" practices 		<ul style="list-style-type: none"> • Telephone inquiries or Letters of complaint to Laboratory Personnel, DOE Operations Offices, Secretary of Energy, Congress, GAO • IG Hotline to report waste, fraud, or mismanagement • FOIA B mechanism to request Government documents • Protest to GAO (GOGO contracts) • Litigation • Local site procedures (e.g.,

Mechanism	Statutory Authorities and Regulations	Authorizations and Permissions	Prohibitions and Limitations	DOE Implementation Policies	Grievance Mechanisms*
Subcontracting	*ADR is Available at any time	<ul style="list-style-type: none"> DEAR 970.1507 Make-or-Buy Plans 	<ul style="list-style-type: none"> Use of effective competitive techniques M&O contractors required to implement make-or-buy plans that establish a preference for providing supplies or services on a least cost basis 		ADR, Ombudsman, appeal to Procurement Manager)

Appendix C

Bonneville Power Administration

Final Report of the Comprehensive Review of the Northwest Energy System

December 12, 1996

Principles for Energy Efficiency

1. Bonneville's energy-efficiency activities are not a "business." The purpose of these activities is to serve Bonneville's statutory directive to promote cost-effective energy-efficiency investments. The Committees consider it unlikely that these activities will completely recover their costs without unduly competing with private enterprises. To address concerns about the net cost of these activities, the Committee proposes borrowing and spending caps in items 11 and 12 below.
2. Bonneville's role in market development should be structured and managed to enlarge energy-efficiency markets beyond that which is being profitably captured by private business.
3. Bonneville's market development activities should be limited to markets or individual situations that are not currently accessible, viable, or profitable for the private sector energy-efficiency industry.
4. Bonneville's market development activities should be designed and implemented to take full advantage of private sector energy goods and services. These activities should not favor one competitor over another.
5. Bonneville will act primarily as a facilitator/aggregator of transactions for services provided by its partners.
6. Specific Bonneville market development activities will be discontinued when they become viable and profitable for the private sector energy-efficiency business.
7. An advisory board should be established immediately to monitor Bonneville's compliance with these restrictions. The advisory board should consist, among others, of private businesses that could be adversely affected by Bonneville's failure to comply with these restrictions, as well as power and transmission customers. Bonneville should consult with and report to this board at regular intervals, and the board should report concerns to the Northwest Power Planning Council.

8. Bonneville's market development activities should be limited to its regional power sales contact customers and federal agencies. Bonneville should provide energy-efficiency services for federal agencies in cooperation with the serving utilities or when the serving utility cannot or elects not to provide those services itself.
9. Agencies and customers contracting for market development services should repay the full cost of those services, including repayment of loans at the appropriate U.S. Treasury rate.
10. Any Bonneville organizational unit or activity currently named "Energy Services" should be renamed "Energy Efficiency." This is intended to clarify that previous proposals to undertake a broad spectrum of other retail services have been dropped, and to preclude Bonneville support for load-building activities that are inconsistent with Bonneville's conservation directives.
11. Bonneville's use of U.S. Treasury capital should be limited to \$5 million per year and restricted to federal projects. This represents a reduction of roughly 50 percent relative to Bonneville's October 31, 1996, proposal, and a reduction of \$71 million relative to the final rate case figure. Capital borrowed from the U.S. Treasury should be repaid in full by the participating federal entity. All third party borrowing shall be non-recourse to Bonneville.
12. Bonneville's net costs for market development activities should not exceed \$8 million for the Fiscal Years 1997-2001. Bonneville's energy-efficiency activities should be self-supporting by September 30, 1999, or these activities should be terminated.
13. Bonneville should revise its October 1995 record of decision for firm non-requirements products and services contracts by replacing the "Energy Services" section with an "Energy Efficiency" section that incorporates a final plan for energy-efficiency activities consistent with the restrictions herein. The energy-efficiency plan should not include activities listed in the original Record of Decision "Energy Services" section except those directly related to energy-efficiency. Other new activities listed in the original Record of Decision "Energy Services" section should not be offered by any part of Bonneville in competition with the private sector.

Appendix D

Bonneville Power Administration

Principles for Federal Energy Efficiency Projects outside the Pacific Northwest *

February 17, 1999

1. Bonneville will require that all parties who are project stakeholders (the federal agency, local serving utility and energy service provider) express their agreement with and support for Bonneville's participation.
2. The nature of Bonneville's participation must be consistent with the recommendations of the 1996 Comprehensive Regional Review Report regarding Bonneville's Energy Efficiency activities.
3. Bonneville must be fully reimbursed for all costs associated with project activities.
4. Bonneville's participation must fall within the constraints of its existing workload capabilities and prior commitments.
5. Bonneville's participation must provide some form of benefit to constituencies we serve in the Pacific Northwest.

* BPA has agreed to provide energy efficiency expertise to the General Services Administration (GSA) through GSA's utility services office in Washington, D.C. Those efforts are consistent with authorities of both agencies. BPA's actions are also consistent with the principles described above.

APPENDIX E

Power Marketing Administrations

Statutory Authorities and Regulations

BONNEVILLE POWER ADMINISTRATION

FUNCTION/ ACTIVITY	LEGAL/REGULA- TORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTA- TION POLICIES	GRIEVANCE PROCEDURES*
Work for Others					
BPA performs utility related work, such as line relocations; estimated costs are typically paid in advance. BPA also does conservation and renewable resource work.	<ul style="list-style-type: none"> • Economy Act 31 USC 1535 • Intergovernmental Cooperation Act 31 USC 6501 • Northwest Power Act Transmission System Act • Bonneville Project Act • Energy Policy and Conservation Act of 1992 	<ul style="list-style-type: none"> • Federal agency may provide goods and services for another Federal agency. • Federal agency may provide services to state and local governments. • Allow power marketing, conservation, renewable resource, and construction, operation and maintenance of transmission facilities for transmission of Federal hydropower in Pacific Northwest. 	<ul style="list-style-type: none"> • When not available as cheaply or conveniently from commercial sources. • When state or others request such services and pay all costs. • Subject to limitations placed in appropriation acts. 	<ul style="list-style-type: none"> • Bonneville Purchase Instructions. • Best buy. 	<ul style="list-style-type: none"> • Letters of Complaint Congress GAO DOE-Acting Deputy Secretary DOJ • IG Hotline, FOIA • Arbitration of procurement contracts • Federal court <p>*ADR is Available at any time</p>

FUNCTION/ ACTIVITY	LEGAL/REGULA- TORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTA- TION POLICIES	GRIEVANCE PROCEDURES*
Develop and Deploy Communications System					
<p>Communication System includes Fiber Optics Cable and microwave radio equipment and fiber is being installed as replacement for microwave and Bare Static Wire on transmission lines to maintain and improve reliability. Leasing avoids/defrays communication costs.</p> <p>BPA also makes its property available to private telecommunication firms to site antennas.</p>	<ul style="list-style-type: none"> • Northwest Power Act, 16 USC 839 et seq. • Transmission System Act , 16 USC 838 et seq. • Bonneville Project Act, 16 USC 832 et seq. • Telecommunica-tions Act of 1996, §704 • GSA Bulletin FPMR D-242 	<ul style="list-style-type: none"> • Presidential memorandum 			<ul style="list-style-type: none"> • Letters of Complaint Congress GAO DOE-Acting Deputy Secretary Contract Disputes Act Proceedings DOE Board of Contract Appeals Proceedings • Court of Federal Claims FOIA <p>*ADR is Available at any time</p>

SOUTHEASTERN, SOUTHWESTERN AND WESTERN AREA POWER ADMINISTRATIONS

FUNCTION/ACTIVITY	STATUTORY/REGULATORY AUTHORITY	AUTHORIZATIONS/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE MECHANISMS
WORK FOR OTHERS					
Southwestern (Southwestern performs limited utility related work, such as line relocations; estimated costs are typically paid in advance.)	Economy Act 31 USC 1535 Intergovernmental Cooperation Act 31 USC 6501 Section 5, Flood Control Act Annual Budget Authority	Federal agency may provide goods and services for another Federal agency. Federal agency may provide services to state and local governments. Section 5 allows construction of transmission facilities for transmission of Federal hydropower.	When not available as cheaply or conveniently from commercial sources. When state or others requests such services and pays all costs.	DOE Order 481.1 Work Complementary to DOE No adverse impact No direct competition with private sector No future burden on DOE	Letters of Complaint Congress GAO DOE-Acting Deputy Secretary DOJ IG Hotline
Western	Economy Act 31 USC §1535 FAR Part 17.5 "Interagency Acquisitions Under the Economy Act" Intergovernmental Cooperation Act (Pub.L. 90-577) (31 USC §§ 6501-8)	Federal agency may provide goods and services for another Federal agency. Federal agency may provide services to state and local government.	When not available as conveniently or cheaply from commercial sources. When state requests such services and pays all costs.	DOE Order 481.1 Work complementary to DOE No adverse impact No direct competition with private sector No future burden on DOE Contractors may not respond to RFPs	Letters of Complaint: Congress GAO Secretary of Energy PMA Administrators WAPA Regional Managers Call IG Hotline and report waste, fraud, or mismanagement FOIA B mechanism to request Government documents.

FUNCTION/ACTIVITY	STATUTORY/REGULATORY AUTHORITY	AUTHORIZATIONS/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE MECHANISMS
FIBER OPTIC TRANSMISSION					
Southwestern - Development and Deployment of Communications System (Communication System includes Fiber Optics Cable installed as replacement for Bare Static Wire on transmission lines to avoid/defray communication costs.)	Flood Control Act of December 22, 1944, 16 U.S.C.A. 825s §5, (1996).	<p>Provides that power and energy generated at reservoir projects under the control of the Department of the Army not required in operation of such projects be delivered to the Secretary of Energy, who shall transmit and dispose of such power at the lowest possible rates to consumers consistent with sound business practices.</p> <p>Rate schedules are based on recovery of the cost of producing and transmitting the electric energy, including amortization of the capital investment allocated to power over a reasonable period of years.</p> <p>Rates are approved by the Secretary of Energy.</p>	<p>Budget and Accounting Act Procedures Act of 1950, act of September 12, 1950, ch 946, 64 Stat. 832, 15 U.S.C.A. §1531 et seq.</p> <p>Pertains to transfers and reimbursements within or among Federal agencies.</p>		
Southwestern - Fiber Optic Exchange Program (Southwestern has exchanged dark fiber access with a adjoining utility system to avoid unnecessary construction and reduce operating costs.)	Section 5, Flood Control Act Annual Budget Authority	Section 5 authorizes Southwestern to construct maintain and operate a transmission system. Fiber optics communications support the transmission system. in some cases, exchange of dark fiber with other utility operations fulfills Southwestern's obligation to follow the "sound business principles" doctrine expressed in Section 5. Further authority for such exchanges is obtained through the annual budget submission process.	Southwestern does not operate as a communications "common carrier" or offer lighted fiber to other utilities.	Delegation Order to Administrator dated April 25, 1986	<p>Letters of Complaint Congress GAO DOE-Acting Deputy Secretary</p> <p>Contract Disputes Act Proceedings</p> <p>DOE Board of Contract Appeals Proceedings</p>

FUNCTION/ACTIVITY	STATUTORY/REGULATORY AUTHORITY	AUTHORIZATIONS/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE MECHANISMS
Western	<p>Section 10 of the Reclamation Act of 1902 (32 Stat. 388)</p> <p>Reclamation Project Act of 1939 (53 Stat. 1187)</p> <p>Department of Energy Organization Act of 1977 (42 USC § 7152, Pub.L. 95-91, 91 Stat. 565) (Generally referred to as "Reclamation Law")</p> <p>Also see Flood Control Act of 1944</p>	None	Notification to Congress	None	<p>Letters of Complaint: Congress GAO Secretary of Energy PMA Administrators WAPA Regional Managers</p> <p>Contract Disputes Act Court of Federal Claims</p> <p>FOIA - Mechanism to request Government documents</p>

FUNCTION/ACTIVITY	STATUTORY/REGULATORY AUTHORITY	AUTHORIZATIONS/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE MECHANISMS
COMMERCIAL ANTENNA SITING					
Western	Section 704(c) of the Telecommunications Act of 1996 (Pub.L. 104-1-4) (47 USC § 332 note)	<p>"Facilitating Access to Federal Property for the Siting of Mobile Services Antennas" Presidential Memorandum of August 10, 1995</p> <p>GSA Bulletin FPMR D-242 (June 11, 1997)</p>	<p>Extent permitted by law and to the extent possible</p> <p>Agency discretion to deny inappropriate requests and those that endanger public property.</p> <p>Telecommunication service provider responsible for costs associated with siting.</p> <p>Agency may charge reasonable fees to telecommunications service provider (OMB Circular A-25, "User Charges", revised July 8, 1993)</p>	None	<p>Letter of Complaint:</p> <p>Congress</p> <p>GAO</p> <p>GSA</p> <p>Secretary of Energy</p> <p>PMA Administrator</p> <p>WAPA</p> <p>Regional Managers</p> <p>Agency request review in accordance with GSA Bulletin FPMR D-242, Attachment B</p>

FUNCTION /ACTIVITY	STATUTORY/REGULATORY AUTHORITY	AUTHORIZATIONS/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE MECHANISMS
ANCILLARY SERVICES					
Western	Reclamation Law Flood Control Act of 1944 Federal Power Act (FPA) § 211 FERC Order 888 (888-A), Promoting Wholesale Competition Through Open Access Non- discriminatory Transmission Services by Public Utilities, FERC Stats. & Regs., 1991-1996 ¶31,036 at pp. 31, 742-743 Energy Policy Act of 1992 (Pub.L.102--486, Title VII)	FERC filed WAPA Open Access Tariff (OAT)(63 FR 521)	Subject to availability and provisions of WAPA's OAT	DOE established policy that PMAs would comply with FERC Order 888, to extent legally possible.	Letters of Complaint: Congress GAO Secretary of Energy PMA Administrator WAPA Regional Managers FERC under FPA § 211 Federal Register Notice Opportunity to comment in public process for WAPA Open Access Tariff Motion to Intervene and Protest at FERC (18CFR §§ 385.211 and 385.214)

FUNCTION/ACTIVITY	LEGAL/REGULATORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE PROCEDURES
TRANSMIT ENERGY FOR FEDERAL POWER CUSTOMERS AND OTHERS					
Southeastern	<p>Flood Control Act of December 22, 1944, 16 U.S.C.A. 825s §5, (1996).</p> <p>Department of Energy Organization Act, Pub.L. No. 95-91, §302,91 Stat. 578 (1977) 42 U.S.C. A. § 7152</p>	Provides that Southeastern arrange transmission arrangements with area utilities. Accordingly, Southeastern has arrangements with 18 utilities to provide transmission services.	Southeastern has arrangements with investor-owned utilities under FERC Order 888 Open Access Transmission Services, and "Bundled" arrangements that precede Order 888.	DOE established policy that PMAs would comply with FERC Order 888, to extent legally possible.	<p>Letters of Complaint Congress GAO Secretary of Energy PMA Administrator</p> <p>FERC under FPA § 211</p> <p>Federal Register Notice</p> <p>Opportunity to comment in public process for SEPA Rates and Power Marketing Policies</p> <p>Motion to Intervene and Protest at FERC (18CFR §§ 385.211 and 385.214)</p> <p>Litigation in Federal Courts</p> <p>FOIA B mechanism to request Government documents</p>

FUNCTION/ACTIVITY	LEGAL/REGULATORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE PROCEDURES
	<p>Department of Energy Organization Act, Pub. L. No. 95-91, §302, 91 Stat. 578 (1977) 42 U.S.C.A. §7152</p>	<p>Moneys received from such sales are deposited in the United States Treasury as miscellaneous receipts.</p> <p>All functions of the Secretary of the Interior with respect to the SWPA transferred to the Secretary of Energy. Among other things, the Act grants the Secretary of energy authority to confirm and approve Southwestern's rates. Delegation Order No. 0204-108 as amended November 10, 1993 (58 F.R. 59717). 10 C.F.R. Pt. 300, Federal Energy Regulatory Commission, Confirmation and Approval of the Rates of Federal Power marketing Administrations.</p>	<p>(continued) to provide for attainment and maintenance of health protective national ambient air quality standards.</p> <p>Clean Water Act (33 U.S.C. 1251 et seq.)</p> <p>Objective of the act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.</p> <p>Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901 et seq.)</p>	<p>(continued) transmission functions and comply with certain standards of conduct.</p>	<p>District Court Action</p>

FUNCTION/ACTIVITY	LEGAL/REGULATORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE PROCEDURES
	<p>Act of October 12, 1949, ch. 680, §101 as amended; 16 U.S.C.A. §825S-1</p>	<p>(continued) Authority to confirm, approve and place into effect on an interim Basis power and transmission rates has been delegated to the Deputy Secretary of Energy.</p> <p>Provides Southwestern a continuing fund in the amount of \$300,000 to defray emergency expenses necessary to ensure continuity of electric service, continuous operation of facilities, transmission services and power purchases. The fund is also available to cover power purchases, transmission and wheeling expenses necessary to meet contractual obligations during periods of below-average hydropower generation.</p> <p>Annual Budget Authority</p>	<p>The major objective of the act is to protect the environment and conserve resources through the development and implementation of solid waste management plans by the states.</p> <p>Toxic Substances Control Act (TSCA) (15 U.S.C. 2601 et seq.)</p> <p>This act set up the toxic substances program which is administered by the EPA. The act also regulates the labeling and disposal of polychlorinated biphenls (PCBs) and prohibited their production and distribution after July 1979. In 1986, Title II, "Asbestos Hazard Emergency Response," was added to address issues of inspection and removal of asbestos products in schools and other buildings. The</p>		District Court Action

FUNCTION/ACTIVITY	LEGAL/REGULATORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE PROCEDURES
			<p>(continued) objective of this act is to set in place comprehensive, national scheme to protect humans and environment from dangers of toxic substances.</p> <p>National Environmental Policy Act (NEPA) (42 U.S.C. 4341 et seq.)</p> <p>This act was passed in 1970 and requires Federal agencies to assess the environmental impact of implementing their major programs and actions early in the planning process.</p> <p>Endangered Species Act (16 U.S.C. 1531-1542)</p> <p>This act seeks to conserve endangered and threatened species. U.S. Fish and Wildlife Service must promulgate a list of endangered and</p>		<p>District Court Action</p> <p>District Court Action</p>

FUNCTION/ACTIVITY	LEGAL/REGULATORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTATION POLICIES	GRIEVANCE PROCEDURES
			(continued) threatened species and designate critical habitat for these species. Federal agencies must carry out programs for the conservation of listed species and must take actions to ensure that projects they authorize, fund, or carry out are not likely to jeopardize the existence of the listed species.		
Western	Reclamation Law Flood Control Act of 1944 Federal Power Act (FPA) § 211 FERC Order 888 (888-A), <i>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities</i>, FERC Stats. & Regs., 1991-1996 ¶31,036 at pp. 31, 742-743 Energy Policy Act of 1992 (Pub.L.102--486, Title VII)	FERC filed WAPA Open Access Tariff (OAT)(63 FR 521)	Subject to availability and provisions of WAPA's OAT	DOE established policy that PMAs would comply with FERC Order 888, to extent legally possible.	Letters of Complaint: Congress GAO Secretary of Energy PMA Administrator WAPA Regional Managers FERC under FPA § 211 Federal Register Notice Opportunity to comment in public process for WAPA Open Access Tariff Motion to Intervene and Protest at FERC (18CFR §§ 385.211 and 385.214)

FUNCTION/ ACTIVITY	LEGAL/REGULA- TORY AUTHORITY	AUTHORITIES/ PERMISSIONS	PROHIBITIONS/ LIMITATIONS	DOE IMPLEMENTA- TION POLICIES	GRIEVANCE PROCEDURES*
Transmit Energy for Federal Power Customers and Others					
Ancillary Services Offered per Order 888	<ul style="list-style-type: none"> • Northwest Power Act, 16 USC 839 et seq. • Transmission System Act, 16 USC 838 et seq. • Bonneville Project Act, 16 USC 832 • Energy Policy Act of 1992, P.L. 102-486 	<ul style="list-style-type: none"> • FERC filed BPA tariff 	<ul style="list-style-type: none"> • Federal law and BPA organic acts 	<ul style="list-style-type: none"> • FERC Order No. 888, 61 F.R. 21540 (May 10, 1996) • BPA voluntarily follows • FERC Order No. 889, 61 F.R. 21737 (May 10, 1996) • BPA voluntarily follows 	<ul style="list-style-type: none"> • Letters of Complaint Congress GAO DOE-Acting Deputy Secretary • FERC Proceedings • District Court Action <p>*ADR is Available at any time</p>